72-1702 FILE COPY

Supreme Court, U. S.
FILED
JUN 15 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of United States

1972 TERM

HERBERT GUEST
Petitioner,

V.

UNITED STATES OF AMERICA
Respondent.

NO. 72-1702

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

James Hudson

HUDSON AND MONTGOMERY

Post Office Address:
313 Southern Mutual Building
Athens, Georgia 30601

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Herbert Guest, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on the 17th day of April, 1973, in which rehearing was denied on the 14th day of May, 1973.

OPINION BELOW

The judgment of the Court of Appeals for the Fifth Circuit, rendered without an opinion, is attached hereto as Appendix "A". The District Court rendered no opinion in this case.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 17, 1973. That Court denied Petitioner's petition for rehearing on May 14, 1973. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether the admission into evidence of tangible items, for the possession of which Defendant is being charged in a criminal proceeding, when all the persons through whose custody those tangible items passed were not produced as witnesses constitutes a deprivation of the Defendant's rights under the Sixth Amendment to the United States Constitution to confront and cross-examine the witnesses against him.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Six:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense

STATEMENT OF THE CASE

The Petitioner, Herbert Guest, was indicted and tried in the United States District Court for the Middle District of Georgia on a nine-count indictment, charging the sale of a stimulant drug, distribution of non-narcotic control substances, sale of counterfeit drugs, possession of control substances, and holding for sale a counterfeit drug, all in violation of Federal Criminal Law. Defendant pled not guilty, and was tried before a jury and convicted on all nine counts.

During the course of Defendant's trial, various State and Federal Agents testified that they bought or took from the possession of the Defendant certain items thought to contain

drugs, control substances or counterfeit drugs. The agents testified that they transferred the possession of those drugs or control substances which comprised Government Exhibits 2-12 to Agent Wayne Smith. Agent Smith testified that on August 13, 1971, he mailed overnment Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 to the Office of the Bureau of Narcotics and Dangerous Drugs in Washington, D. C. He further testified that these exhibits were mailed in several boxes, via registered mail, in a sealed package. The receipt for these packages was signed by one Victor J. Warren, Jr.

Witness Sebastian Manganello testified that he received the exhibits from his supervisor, Victor Warren; that he (Manganello) broke the seal on the packages and analyzed the contents of each package.

Defendant objected to the testimony of witness Manganello regarding the analysis of the contents of the packages on the ground that the chain of custody had never been sufficiently proven and that to allow the testimony of this witness without establishing the chain of custoday deprived the Defendant of his Sixth mendment right to confront and cross-examine the witnesses against him.

The jury convicted the Defendant on all nine counts of the indictment, and he was sentenced to imprisonment for a period of one year and a fine of $1,000.00 on each of Counts 5, 7 and 9; five years and a fine of $10,000.00 on each of Counts 1, 2, 3, 4, 5, 6, and 8, service of all sentences to run concurrently, making a total sentence of five years imprisonment and a fine of $11,000.00, with said sentences to be followed by a special parole term of 15 years on each of Counts 2, 3, 4, 6 and 8 to run concurrently.

Defendant appealed his conviction to the United States Court of ppeals for the Fifth Circuit which affirmed the judgment of the Trial Court, without opinion. Petitioner timely filed a petition for rehearing in the Court of Appeals which was denied.

REASONS FOR GRANTING THE WRIT

The issuance of a Writ of Certiorari to review the decision of the ourt below is sought upon the basis of (1) A decision

by a Court of Appeals on important questions of Federal Law which has not been, but should be, settled by this Court, and (2) A decision by the Court of Appeals which so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

ARGUMENT AND CITATION OF AUTHORITIES

The Sixth Amendment to the Constitution of the United States provides among other things that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . " To completely do away with the chain of custody of the evidence as was done in this case is to deny this Petitioner this Sixth Amendment right.

Every postal employee who handled this particular bit of mail was, in effect, allowed to testify against this Petitioner without being present in court. The person who received the evidence at the FBI aboratory in Washington, D. C. was tacitly allowed to testify against this Petitioner.

The chain of custody of evidence is a very vital incident to a trial. This Court should not allow registered or certified mail to take the place of an honest, live, cross-examinable witness. To do so is to throw out this Petitioner's right under the Sixth Amendment to be confronted by the witnesses against him.

In effect, the Post Office Department and the gentleman who received the evidence at the laboratory in Washington, D. C. testified against Petitioner. They tacitly testified that they knew this was the same material that Agent Smith had mailed from Atlanta, Georgia. It would not be any more violative of this Petitioner's rights to confrontation of witnesses if the Court would simply allow an affidavit by the laboratory technician to have been read into evidence by the District Attorney. Certainly, the courts would not uphold such action.

To allow the Government to use the United States Mail and other witnesses to prove the chain of custody when these witnesses are not present actually entices the Government to cheat.

In our opinion to, thus, construe the Sixth Amendment as not being applicable to this situation would be the same as allowing search warrants to issue under the Fourth Amendment by a police officer's merely stating to the Magistrate, "I have probable cause."

The Court has never decided this question before, and it should.

We realize it will be a little more difficult to prove the chain of custody, but the possibilities of harm and unfairness far outweigh this little inconvenience to the Government.

WHEREFORE, Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED, this 14th day of June, 1973.

HUDSON AND MONTGOMERY

BY: s/

Attorneys for Petitioner

Post Office Address:

313 Southern Mutual Building
Athens, Georgia 30601

(404) 549-9823

CERTIFICATE OF SERVICE

I, JIM HUDSON, of counsel for the Petitioner in the above matter, do hereby certify that I have, prior to filing, served three copies of the foregoing on Honorable William J. Schloth, United States Attorney, Post Ofice Box U, Macon, Georgia, 31202, in an envelope with sufficient postage affixed and have mailed three copies with air mail postage afixed to the Solicitor General, Department of Justice, Washington, D. C., as required by law.

This 14th day of June, 1973.

s/

James Hudson

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1046
Summary Calendar*

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

HERBERT GUEST,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

April 17, 1973

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED.[1] See Local Rule 21.[2]

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See United States v. Graham, 5 Cir., 1972, 464 F.2d 1073.

[2]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1046
Summary Calendar*

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

HERBERT GUEST,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

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April 17, 1973

ON PETITION FOR REHEARING

(MAY 14, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX "B"

CERTIFICATE OF SERVICE

I, JAMES E. HUDSON, of Counsel for the Petitioner in the above-styled case, do hereby certify that I have, prior to filing, served three copies of the foregoing Appendix "B" to Petitioner's petition or certiorari on William J. Schloth, United States Attorney, Post Office Box U, Macon, Georgia, 31202, in an envelope properly addressed with sufficient postage affixed thereto and have served Hon. Erwin N. Griswold, by mailing three copies via air mail to the Solicitor General, Department of Justice, Washington, D. C., as required by law.

This 9th day of July, 1973.

James E. Hudson

JAMES E. HUDSON

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1702

HERBERT GUEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government failed to prove the chain of custody of narcotic substances admitted into evidence against him.

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on all nine counts of an indictment charging illegal sale and distribution of stimulant drugs, counterfeit drugs, and non-narcotic controlled substances; knowing possession of a non-narcotic controlled substance; and holding a counterfeit drug for sale; all in violation of 21 U.S.C. (Supp. V, 1964 ed.) 331(q)(2), 333(b), and 21 U.S.C. 331(i)(3), 841(a)(1). He was sentenced to a year's imprisonment on each of three counts and five years' imprisonment on each of the remaining six counts, all sentences to run concurrently, and was fined a total of $11,000. He was also sentenced to a special parole

term of fifteen years on each of five counts, to run concurrently. The court of appeals affirmed without opinion (Pet. App. A).[1]

At trial, the government introduced twelve exhibits (Gov. Exs. 1-12) consisting of various capsules and tablets containing amphetamine and caffeine, which had been obtained from petitioner either through purchase by an undercover agent of the Georgia Bureau of Investigation or by seizure pursuant to a search warrant executed shortly after petitioner's arrest.

The materials in Exhibits 2 through 12 were each given by GBI Agent Copeland to BNDD Agent Smith, initialled and sealed by Copeland and Smith, and sent by registered mail to the Narcotics and Dangerous Drugs Laboratory in Washington. There each was received, receipted for, and transmitted, still under seal, to chemist Manganello, who subsequently testified at the trial. He broke the seal, performed certain tests, resealed and initialled the evidence, and placed it in the laboratory vault, where it remained until just before trial (Tr. 109, 169, 180-181). Immediately prior to trial, Manganello personally retrieved the exhibits and mailed them to the Atlanta BNDD office, which transmitted them to the United States Attorney still under seal. The seal was inspected by Manganello and broken for the purpose of removal of the exhibits at the start of trial (Tr. 180-181).

Petitioner's sole contention is that the government failed to prove the chain of custody of this evidence, since it did not offer the testimony of every postal

[1] The court of appeals affirmed on April 17, 1973, and denied a petition for rehearing on May 14, 1973. The petition for a writ of certiorari was filed on June 15, 1973, and is therefore out of time under Rule 22(2) of the Rules of this Court.

employee who handled the packages containing the evidence while they were in transit to and from the BNDD Laboratory, and that he therefore has been deprived of his Sixth Amendment right of confrontation. The contention is groundless.

To be admitted into evidence, an object connected with a crime need only be shown to be in substantially the same condition as when the crime was committed. *United States* v. *S.B. Penick & Co.*, 136 F. 2d 413 (C.A. 2); *Williams* v. *United States*, 381 F. 2d 20, 21 (C.A. 9). That showing was plainly made in the instant case (Tr. 161-190, 197-198). Petitioner's objections as to the chain of custody go to the weight to be accorded such evidence, rather than to its admissibility, and are therefore proper questions for the jury—questions which the jury here resolved against petitioner. See *United States* v. *Graham*, 464 F. 2d 1073 (C.A. 5).

Moreover, petitioner has offered no evidence to rebut the long-established presumption that mail properly addressed, sent in the normal course of the mails, and reaching its intended destination in usual time is actually received by the addressee in the same condition as it was sent. *Hagner* v. *United States*, 285 U.S. 427, 430; *Rosenthal* v. *Walker*, 111 U.S. 185, 193.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.